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No. 81-2171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN GAS ASSOCIATION,

Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,

On Appeal From The United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF APPELLANT AMERICAN GAS ASSOCIATION OPPOSING MEMORANDA TO LIMIT REVIEW

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The Solicitor General has recommended that the Court should limit the questions in this case, wherein the jurisdiction of this Court is being invoked under 28 U.S.C. §1252, to the ultimate constitutionality of section 202(c) of the Natural Gas Policy Act and its severability from the remainder of section 202.[1] Treating the memoranda of the United States and of the appellees-respondents in their true light as limited Motions to Dismiss, the American Gas Association submits its opposition to the motions, pursuant to Rule 16.5 of this Court.[2]

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[1] Memorandum for the United States, 20. The Consumer Energy Council of America goes even further and would limit this Court's consideration to the constitutionality of the legislative veto. Memorandum of Appellees-Respondents, 10.

[2] The American Gas Association no longer represents the Michigan Consolidated Gas Company, listed at page A-10 of the Appendix to the Jurisdictional Statement filed herein.

The suggestions to limit the issues herein are totally without merit, are based on no cited authority, and are directly contrary to prior holdings of this Court. In *McLucas* v. *DeChamplain*[3], the Court noted that:

> an appeal under §1252 brings before us, not only the constitutional question, but the whole case, e.g. *United States* v. *Raines*, [362 U.S.] at 27 n. 7; *see* 9 J. Moore Federal Practice, §110.03[5], p. 96 (2nd ed. 1973), including threshold issues of subject-matter jurisdiction, *United States* v. *American Friends Service Committee*, 419 U.S. 7, 12 n. 7 (1974), and whether a three-judge court was required, *Fleming* v. *Nestor*, 363 U.S. 603 (1960).

In *United States* v. *Raines*[4], Justice Brennan, delivering the opinion of the Court, noted that:

> [t]he very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power – 'the gravest and most delicate duty that this Court is called on to perform.' [Quoting Holmes, J., in *Blodgett* v. *Holden*, 275 U.S. 142 (1927)] *Marbury* v. *Madison* (U.S.) 1 Cranch 137, 177-80. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal right of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which

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[3] 421 U.S. 21, 31-32 (1975).

[4] 362 U.S. at 20-21 (1960).

it is to be applied.' *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33.

The Court also read the "broad nature" of 28 U.S.C. §1252 as indicating "a desire of Congress that the whole case come up." 362 U.S. 17, 27 n. 7. That desire is eminently reasonable in light of the gravity of the Court's responsibility in its review of any judicial decision purporting to invalidate an act of Congress. In this case, there are three preliminary issues, appropriate resolution of any of which precludes the Court from considering the merits of appellees-respondent's constitutional challenge.[5] Indeed, it would be appropriate, on the basis of pleadings now filed, for the Court to exercise its jurisdiction in this case immediately by dismissing the original petitions for review filed in the circuit court by appellees-respondents. Insofar as this Court is impressed by the executive branch's belief that the question of the constitutionality of the veto device used as a legislative tool by Congress manifestly warrants quick resolution[6], the Solicitor General has noted the pending challenge to the two-House veto provision in Section 21(a) of the Federal Trade Commission Improvements Act of 1980 now awaiting oral argument on October 12, 1982, before the United States Court of Appeals for the District of Columbia Circuit. *Consumers Union of the United States* v. *Federal Trade Commission*, No. 82-1737.[7]

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[5] Jurisdictional Statement of American Gas Association, 13-20; the three issues include (a) Article III requirements, (b) severability, and (c) mootness.

[6] Memorandum for the United States, 12.

[7] Memorandum for the United States, 18 n. 5.

CONCLUSION

If the Court concludes that it cannot dismiss, on the basis of argument already before the Court, the petitions for review originally filed by appellees-respondents, the Court should note probable jurisdiction of each of the questions presented in this case, and require full briefing and argument thereon.

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